No. 86-1360

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSTELLATION LINES, S.A. and
ENTERMAR SHIPPING CO. S.A.,

Petitioners,

—against—

GEORGE KARVELIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

THEODORE H. FRIEDMAN
Counsel for Respondent
325 Broadway
New York, New York 10007
(212) 619-1690

JETHRO M. EISENSTEIN
FRIEDMAN & EISENSTEIN
325 Broadway
New York, New York 10007
Of Counsel

15pp

TABLE OF CONTENTS

Table of Authorities

Cases: PAGE

No. 86-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSTELLATION LINES, S.A. and
ENTERMAR SHIPPING CO. S.A.,

Petitioners,

—against—

GEORGE KARVELIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

On March 24, 1984, respondent George Karvelis lost four fingers in an accident aboard the vessel Constellation Enterprise, which was then tied up undergoing repairs in the Port of Newark, New Jersey (15a).*

Karvelis required extensive surgery at Bellevue Hospital in New York, where he was hospitalized for months. While still hospitalized in New York, Karvelis commenced

---

* References in parentheses are to the Appendix annexed to the Petition.

suit against petitioners, his employer and the owner of the vessel, to recover damages for his injury under the Jones Act and the General Maritime Law.

The Constellation Enterprise sailed under the flag of Constellation Lines. In addition to the Enterprise, Constellation Lines consisted of several ships, all of which were engaged in the Atlantic Ports to Mediterranean trade. Each of the ships made regularly scheduled stops along the East Coast of the United States (20a). The voyages of the Enterprise and the other Constellation Lines vessels were advertised weekly in the Journal of Commerce, a domestic periodical (18a).

All nine of the voyages of the Enterprise preceding the incident in which Karvelis was injured either originated in the United States or terminated here. Of the time spent in port by the Enterprise, the period spent in the United States was at least three times the amount that the vessel spent in the port of any other country, including Greece, the country in which the vessel was registered (18a-19a).

The earnings of the Enterprise were derived from cargo which originated in the United States and from cargo which came from the Mediterranean to the United States. American cargo, loaded aboard the Enterprise in the United States, earned annually approximately $7 to $8.5 million in freight charges, while cargo from the Mediterranean to the United States accounted for only $1.5 to $2.5 million of such revenue. The other vessels of Constellation Lines, which had itineraries similar to that of the Enterprise, earned revenues from American and foreign freight in like proportions (19a).

Virtually the entire running of the Enterprise and the other vessels of Constellation Lines had been delegated

by petitioners to Constellation Navigation, Inc. ("Navigation"), an American agent, whose principal office was located in New York City.

At its office in New York City, Navigation had 35-40 employees. Sub-agents and booking offices were also maintained by Navigation in Charleston, Richmond, Baltimore, Chicago, Norfolk, Philadelphia, Cleveland, New Orleans, Boston, Houston and other American ports.

An agency agreement between petitioners and Navigation, equivalent to a general power of attorney, gave Navigation complete authority over the details of the running of Constellation Lines' vessels. By virtue of this authority, the Enterprise and the other ships were operated from the United States by Navigation.[1]

Navigation maintained "multi-million" dollar accounts in two New York City banks, in which it deposited the freight revenues earned by the Enterprise and Constellation Lines' other vessels. From those bank accounts, Navigation paid the expenses of the Enterprise and the other vessels of Constellation Lines (18a).[2]

Navigation also arranged for the berthing of the vessels, traffic matters, fuel and stevedoring, insurance as well as the processing of cargo and personal injury claims.

---

[1] The right to use the name "Constellation Lines" had been granted to petitioner Constellation Lines, S.A. by Navigation. In other words, Navigation, the American entity, owned the trade name under which the vessels operated (19a).

[2] A "Disbursement Account" which recorded the expenses paid from New York City by Navigation with respect to the Enterprise showed transactions over $240,000 for one month. Among the expenses paid for by Navigation was the cost of Constellation Lines' advertising in the Journal of Commerce.

All of the foregoing was done by Navigation and its sub-agents in the United States without any supervision or control from petitioners' Piraeus office (18a).[3]

In addition, the petitioners' owners and directors were shown to have extensive business interests in the United States, which involved them in the operation and servicing in this country of the Enterprise and the other vessels of Constellation Lines.

Through a corporate "nominee", petitioners' principals owned 50% of the shares of Trident Shipping Agency, Inc., a sub-agent of Navigation in Charleston, South Carolina. Trident performed ship agency services for the Enterprise and the other ships of Constellation Lines.

Through a similar corporate nominee, petitioners' principals also owned 50% of the shares of Wando Stevedoring Co., Inc., which performed stevedoring services in Charleston for the vessels of Constellation Lines, including the Enterprise (20a).

Petitioners moved to dismiss for lack of jurisdiction and on grounds of *forum non conveniens*. On the facts set forth above, the District Court found that the Enterprise was managed from New York "to a significant extent" (18a), without "the direction, supervision or control of the owners and charterers in Greece" (18a). Concluding that United States law, including the Jones Act, 46 U.S.C. §688, should apply, the District Court denied petitioners' motion.

On April 30, 1986, after a four day jury trial, the District Court entered a judgment in favor of respondent in

---

[3] Significantly, the agency agreement between petitioners and Navigation also provided that any disputes would be resolved by the parties in the United States in accordance with the laws of the State of New York.

the amount of $300,000 (26a). The District Court judgment was appealed to the United States Court of Appeals for the Second Circuit which affirmed, adopting the opinions of the District Court (1a).

Petitioners have appended to their petition (pages 28a-35a) what purports to be a translation of a decision rendered on June 18, 1986, in a "negative declaratory action", in the Single-Member Court of First Instance of Piraeus, Greece. The document was not proferred in, and is not a part of the record of the proceedings below.

The document recites that proceedings in Greece were had on May 12, 1986 in the absence of respondent (28a). Respondent was said to be "of unknown abode" (29a), even though petitioners' counsel had been with respondent in the District Court in New York not two weeks earlier.

Reasons for Denying the Writ

1. The Greek judgment appended to the Petition is not a part of the record below and was obtained through apparent misrepresentation.

Petitioners suggest as a reason for granting the writ that a judgment in Greece in a "negative declaratory action" is in conflict with the judgment rendered and affirmed by the Courts below. For this reason, the petitioners urge that this Court must re-evaluate the conflict of law analysis applicable to Jones Act cases, in order to protect U.S. judgments.

In order to create a basis for this argument, petitioners have unilaterally placed before this Court what purports to be a translation of the judgment of the Greek court. Although the document recites that the trial proceedings had occurred on May 12, 1986, within two weeks after a

trial of this case in the District Court, and that a judgment was rendered on June 18, 1986, well before petitioners' appeal to the United States Court of Appeals for the Second Circuit was perfected, petitioners never even served this document on respondent, let alone presented it to the courts below as a basis for relief. The document forms no part of the record in the court below, and for that reason alone, ought simply to be ignored.

The document further reveals that despite day to day contact with respondent in the District Court in New York, petitioners represented to the Greek court that respondent was "of unknown abode", and were thereby permitted to proceed *ex parte*. Unfettered by an adversary, petitioners did not advise the Greek court that the United States action was the first commenced, did not advise the Greek court of the bases on which the United States Courts had asserted jurisdiction, and did not advise the Greek court that at the time the matter came on for hearing in Greece, a judgment had already been entered in the United States District Court.

What the Greek court, armed with this information, would have done, respondent cannot say. The fact is, however, that the Greek judgment on its face shows that petitioners substantially and materially misrepresented the basis and status of the United States action, and thereby obtained judgment in Greece. In this Court, petitioners invoke the conflict they created through misrepresentation. Such conduct, we suggest, should not be countenanced. Substantively, the conduct vitiates the Greek judgment as a basis of conflict warranting this Court's review.

2. This case does not implicate the question of due process limitations on the assertion of Jones Act jurisdiction.

Petitioners next suggest that review of this case is appropriate because the assertion of Jones Act jurisdiction over the nominally foreign shipowner implicates constitutional, due process limitations on the assertion of jurisdiction. While such issues, properly presented, may be appropriate for this Court's consideration, this is not the case for such review. The facts found by the District Court and affirmed by the Court of Appeals showed that petitioners had a substantial presence in the United States, including ownership interests; that their vessel was controlled and managed from New York; and that it functioned for all intents and purposes as a United States business. On these facts, "the question of due process limitations in foreign seamen cases" (petition at 7) is hardly implicated. Compare *DeMateos* v. *Texaco Inc.*, 562 F.2d 895 (3rd Cir. 1977), cert. den. 435 U.S. 904 (1978), in which the vessel involved earned no income from voyages to the United States and had its base of operation in Panama and London. 562 F.2d at 902.

3. Jurisdiction was appropriately asserted here, under settled principles which have consistently been applied.

Contrary to the petitioners' suggestion, the lower courts are not in "disarray" over the application of the tests set forth by this Court in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306 (1970). What petitioners seek to portray as disarray is in fact the different results which flow from the application of those principles to different facts.

Petitioners' effort to demonstrate the proliferation of "factors" considered (Petition at 8) merely shows that courts have engaged in the close factual analysis inherent

in the application of a standard requiring "a cold objective look at the actual operational contacts that this ship and this owner have with the United States." *Hellenic Lines* v. *Rhoditis,* 398 U.S. 306, 310 (1970).

Analysis of the factors which go to assessment of "the real nature of the operation" (id.) may be "exhaustive and complex", but it is hardly inconclusive. It is only through such a process that the real nature of the operation can be revealed.

Stripped to its essence, petitioners' complaint about the need for pre-trial discovery (petition 8-9) is a suggestion that the facade which the shipowner erects with respect to its vessel should control. Such a suggestion is contrary to the teaching of this Court. *Hellenic Lines* v. *Rhoditis,* supra, 398 U.S. at 310.

In their effort to generate reasons for review by this Court, petitioners characterize the decisions of the Courts of Appeal as being in conflict. The examples given of such conflict defeat themselves. *Moncada* v. *Lemuria Shipping Corp.,* 491 F.2d 470 (2d Cir.) cert. den. 417 U.S. 947 (1974) is said to be in conflict with *Phillips* v. *Amoco Trinidad Oil Co.,* 632 F.2d 82 (9th Cir. 1980), cert. den. 451 U.S. 920 (1981). Yet examination of the opinion of the Ninth Circuit in *Phillips* shows that court's view that different rules are appropriate for conventional vessels and stationery drilling rigs, 632 F.2d at 86, and reveals reliance by the *Phillips* Court on *Moncada* as authority for the proposition that different factors have different weight in different settings. 632 F.2d at 85. The same, separate rule for stationery drilling rigs dictated the result in *Vaz Borralho* v. *Keydril Co.,* 696 F.2d 379, 389 (5th Cir. 1983).

Similarly, petitioners posit a conflict, irrelevant to this case, between the Third Circuit and the Second Circuit over the sufficiency of U.S. beneficial ownership alone for application of U.S. law. See petition at 9, n. 3; *DeMateos* v. *Texaco Inc.*, 562 F.2d 895, 902 n. 3 (3rd Cir. 1977), cert. den. 435 U.S. 904 (1978). Notwithstanding the referenced conflict in conceptual views, it is more than probable that the Second Circuit would have denied Jones Act jurisdiction on the facts in *DeMateos,* which revealed no income from U.S. voyages and a base of operation in Panama and London. 562 F.2d at 902. See *Koupetoris* v. *Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976) (shipowner's base of operations in Greece; Jones Act jurisdiction denied despite "regular and continuous course of substantial business" in New York. 535 F.2d at 1395).

Finally, petitioners cite (petition pp. 10 and 11) a series of decisions, said to manifest a "frustrating . . . inconsistency of results". Prime among these is *Fisher* v. *Agios Nicolaos V.*, 628 F.2d 308 (5th Cir. 1980), reh. den. 636 F.2d 1107 (5th Cir. 1981). Judge Brown's dissent from denial of rehearing *en banc* shows that his concern was with the factfinding process, not with the principles to be applied. 636 F.2d at 1111. Judge Brown made clear his view that there had been no finding the vessel was managed and controlled from the United States. Id. at 1109. He noted that doing business in the United States is not the equivalent of having a base of operations here, and that the cases relied on involved more substantial contacts than were present in *Fisher,* id. at 1110.

What emerges from Judge Brown's dissent is concern with dilution of the "base of operations" standard, not disagreement with the applicable standard itself. That *Fisher* was wrongly decided on its facts is no argument

in support of granting certiorari in this case, decided, on the present facts, correctly.

Szumlicz v. *Norwegian American Lines, Inc.*, 698 F.2d 1192 (11th Cir. 1983), turns on a finding that the shipowner's base of operations was in the United States. In *Szumlicz,* jurisdiction was sustained. By contrast, where the evidence shows a base of operations in a foreign country, jurisdiction is appropriately denied, notwithstanding substantial activities in and revenues from the United States. *Koupetoris* v. *Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976) (base of operations in Greece); *Rodriguez* v. *Flota Mercante Grancolombiana, S.A.*, 703 F.2d 1069 (9th Cir.), cert. den. 464 U.S. 820 (1983) (base of operations in Columbia).

Jurisdiction was denied in *Pereira* v. *Utah Transport, Inc.*, 764 F.2d 686 (9th Cir. 1985) cert. dism. 106 S.Ct. 1253 (1986), despite the shipowner's base of operations in San Francisco, because the vessel involved had virtually no contact with the United States. This result is consistent with the injunction to assess the "actual operational contacts that *this ship* and this owner have with the United States." *Hellenic Lines* v. *Rhoditis,* 398 U.S. 306, 310 (1970) (emphasis supplied). See, also, *Phillips* v. *Amoco Trinidad Oil Co.*, 632 F.2d 82, 88 (9th Cir. 1980), cert. den. 451 U.S. 920 (1981) (focus on base of operations of relevant business venture). In *Dalla* v. *Atlas Maritime Co.*, 771 F.2d 1277 (9th Cir. 1985), the base of operations was in the United States and the shipowner's evasiveness led the Court to conclude that there was United States ownership as well. The assertion of jurisdiction appropriately followed.

The cases discussed above show that the location of the shipowner's base of operations has proven to be a work-

able standard. More importantly, it is an appropriate standard, precisely because "an alien [ship]owner, engaged in an extensive business operation in this country, [should not] have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act 'employer'." *Hellenic Lines* v. *Rhoditis,* 398 U.S. 306, 310 (1970).

The Courts of Appeal, applying the standards enjoined upon them by this Court, have consistently held that

> "[a]n important consideration for determining the base of operations is the location at which day-to-day operating activities are conducted. Chiazor [v. Transworld Drilling Co.,] 648 F.2d [1015 (5th Cir., 1981)] at 1019. Accord Phillips v. Amoco Trinidad Oil Co., 632 F.2d 82, 88 (9th Cir. 1980), cert. denied, sub nom., Romilly v. Amoco Trinidad Oil Co., 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312 (1981); Cruz v. Maritime Co. of Philippines, 549 F.Supp. 285, 288-89 (S.D.N.Y. 1982), aff'd, 702 F.2d 47 (2d Cir. 1983); Pavlou v. Ocean Traders Marine Corp., 211 F.Supp. 320, 325 (S.D.N.Y. 1962)."

Diaz v. *Humboldt,* 722 F.2d 1216, 1218 (5th Cir. 1984). *Accord Szumlicz* v. *Norwegian American Line Inc.,* 698 F.2d 1192, 1196 (11th Cir. 1983). The District Court determined, on an ample record, that petitioners' base of operation for the Constellation Enterprise was in New York City, and that petitioners had other, substantial United States contacts. These findings of fact, and the consequent assertion of Jones Act jurisdiction, were affirmed by the Court of Appeals for the Second Circuit as straightforward applications of the tests laid down by this Court (Petition at 3a). No reason has been shown for review of this judgment, and none exists.

CONCLUSION

Respondent urges this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit and to allow its mandate to become effective.

March 25, 1987

Respectfully submitted,

THEODORE H. FRIEDMAN
Counsel for Respondent
325 Broadway
New York, New York 10007
(212) 619-1690

JETHRO M. EISENSTEIN
FRIEDMAN & EISENSTEIN
325 Broadway
New York, New York 10007
Of Counsel